Filed 7/11/19 P. v. Maglietta CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DAMON MAGLIETTA, Defendant and Appellant.	A157070 (Lake County Super. Ct. Nos. CR946149 & CR948665)

Damon Maglietta (appellant) appeals from an order placing him on felony probation after he pled no contest to one count of inflicting corporal injury on a cohabitant. (Pen. Code, § 273.5, subd. (a).)[1] His court-appointed counsel has filed a brief raising no issues, but seeking our independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*). We find no arguable issues and affirm.

I. *FACTS AND PROCEDURAL HISTORY*

Appellant was charged by information with numerous counts: four felony counts of inflicting corporal injury on a cohabitant (§ 273.5, subd. (a)), one felony count of elder abuse (§ 368, subd. (b)(1)), one felony count of dissuading a victim or witness (§ 136.1, subd. (c)(1)), one felony count of criminal threats (§ 422(a)), one misdemeanor count of destroying a wireless communication device to prevent notifying law enforcement of a crime (§ 591.5) and five misdemeanor counts of violating a protective order (§ 273.6,

[1] Statutory references refer to the Penal Code.

subd. (a)). The information also alleged a prior prison term enhancement and an on bail enhancement. (§§ 667.5, subd. (b), 12022.1.)

On August 22, 2018, appellant pled no contest to a single count of inflicting corporal injury on a cohabitant in exchange for a dismissal of the other charges and an initial grant of probation conditioned on 280 days in custody with a waiver of credits per *People v. Johnson* (2002) 28 Cal.4th 1050, 1053–1054 (*Johnson*). (§ 273.5, subd. (a).) He acknowledged in writing on the change of plea form that he had been advised of his constitutional rights to a jury trial, to confront witnesses, to present a defense and against self-incrimination, and he indicated verbally at the change of plea hearing that he understood these rights and was entering the plea freely and voluntarily. He also acknowledged on the change of plea form that he was not taking any medication that affected his ability to understand the form, had not recently consumed alcohol or drugs, and was not suffering from a medical condition. As the factual basis for the plea, it was stated that on April 4, 2017, appellant had been in a dating relationship with the victim and they got into a physical altercation in which appellant struck her and caused injury to her.

On October 1, 2018, appellant indicated he wanted to withdraw his plea and new counsel was appointed for him. Appellant filed a motion to withdraw the plea on November 14, 2018, alleging he had entered the plea without understanding what he was doing because someone had spiked his drink the previous night. The prosecution opposed the motion.

On March 5, 2019, the court held a hearing on the motion at which appellant testified that he was unknowingly under the influence of drugs when he entered his plea and would not have entered the plea otherwise. He testified that he did not sleep the night before he entered his plea and was feeling "anxiety, disoriented, happy I guess." A friend had come over to watch movies and he had consumed Coca-Cola and pizza. The Coca-Cola had fizzed more than usual. The court denied the motion, finding appellant had not met his burden of proving by clear and convincing evidence that his free will had been overcome. It observed: "[Appellant] stated he was under the influence, and I

believe he may have been under the influence of a lack of sleep and anxiety. It's probably not uncommon in these situations. He testified that morning that he attributed it to nervousness, not sleeping, and anxiety. I have no doubt those things were true. The burden is on him to prove by clear and convincing evidence that his free will was overcome by some factor. I didn't hear that his free will was overcome. I heard a conclusory statement that he said if he didn't feel the way he did, he wouldn't have entered this plea. But I didn't hear him testify he didn't really understand what the offer was or he didn't understand what he was doing. I didn't hear any of that type of evidence."

Appellant was placed on probation consistent with his plea agreement.

II. *DISCUSSION*

As required by *People v. Kelly* (2006) 40 Cal.4th 106, 124, we affirmatively note that appointed counsel has filed a *Wende/Anders* brief raising no issues, that appellant has been advised of his right to file a supplemental brief, and that appellant did not file such a brief. We have independently reviewed the entire record for potential error and find none.

The trial court correctly recognized that appellant had the burden to establish good cause to withdraw his plea by clear and convincing evidence. (*People v. Dillard* (2017) 8 Cal.App.5th 657, 665.) "A plea may not be withdrawn simply because the defendant has changed his mind." (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.) The trial court may take the defendant's credibility into consideration, and the appellate court must adopt any factual findings by the trial court that are supported by substantial evidence. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) We review a trial court's ruling for abuse of discretion. (*Ibid*.)

The trial court here could reasonably conclude that appellant had not established he would have rejected the plea but for a spiked drink. Appellant had a lengthy history of crimes involving moral turpitude that could have diminished his credibility with the court when he testified that his Coca-Cola was fizzier than usual, thus suggesting it could have been spiked. He had acknowledged in writing before entering his plea that he had not

consumed drugs or alcohol and was not suffering from a medical condition. The court noted that appellant was probably anxious and nervous due to the circumstances of his case, but found there was no evidence he did not understand what he was doing. There was no abuse of discretion in denying the motion to withdraw the plea.

Appellant was placed on probation as agreed to in his plea agreement. He indicated that he understood he was giving up his right to custody credits under *Johnson*, and that waiver was effective. (*Johnson*, *supra*, 28 Cal.4th at p. 1055.)

We are satisfied that appellant's appointed attorney has fully complied with the responsibilities of appellate counsel and that no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 283.)

III. *DISPOSITION*

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BURNS, J.

People v. Maglietta / A157070